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No. 508

In The

SUPREME COURT OF THE UNITED STATES

October Term 1968

EWELL C. QUALLS,
Petitioner.

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Respondent People of the State of Michigan oppose the Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan relative to its order dated July 23, 1968 denying defendant's application for leave to appeal from the decision of the Michigan Court of Appeals entered March 21, 1968 and order denying rehearing dated May 1, 1968 for the reasons set forth herein.

OPINIONS BELOW

There are no opinions of the courts below that touch on the first question raised by petitioner. The question in its present form was apparently not fully articulated until

the motion for rehearing was filed in the Michigan Court of Appeals (Petitioner's Appendix D). Therefore while the orders of that Court and of the Michigan Supreme Court (Petitioner's Appendix B & C) are applicable to that issue, they contain no specific discussion of it.

QUESTIONS PRESENTED

The respondent disagrees with the statement of questions presented by petitioner because they are based on facts contrary to or different than those shown by the transcript. Respondent submits that the questions, if such are otherwise properly before this Court, should be framed as follows:

1. Where the state trial court reserves decision on a motion for a directed verdict of acquittal made at the conclusion of the People's case and the defendant, without objecting to the reservation, presents evidence, does the use of all the evidence to sustain the conviction violate the constitutional prohibition against self-incrimination?

2. Does a state trial court's denial of a motion for mistrial for the alleged berating of defendant's counsel by an outsider outside the courtroom in the presence of a juror violate the defendant's right to an impartial jury where the court's investigation showed the jurors presence to be disputed, a joint questioning of the jurors showed no prejudice or influence resulting from the alleged occurrence, and an opportunity for further questioning was refused by defendant?

3. After an intelligent, knowing and voluntary waiver of the right to remain silent and to counsel during a state custodial interrogation, does the refusal of the defendant to answer a particular question until he gets counsel make admissions in response to other questions inadmissible?

STATEMENT OF THE CASE

Respondent is unable to accept many of the statements and conclusions in petitioner's statement of the case. It also feels additional facts are relevant. It accordingly invites the Court's attention to the following:

1. Concerning the motion for directed verdict (Question 1).

It was not definitely held by the lower court that there was insufficient evidence at the time of the motion for directed verdict at the close of the people's case to justify denial of the motion and sustain a verdict against the defendant. The trial court simply stated that the presence of provocation was not "conclusively demonstrated" (Petition, Appendix A, p. 31).

After reserving decision on the motion for directed verdict at the close of the people's case, no express objection to the reservation by defendant was made (p. 249).*

2. Concerning the Jury (Question 2).

The Michigan Court of Appeals did not hold that an investigation was not necessary when improper comments in an elevator in the presence of a juror were alleged. It held that the trial judge must ascertain the prejudicial effect of the occurrence (Petition, Appendix A, p. 27).

An investigation of the incident was made (pp. 291-298)

*Page numbers without further designation refer to the transcript of testimony at trial.

and it was learned that the presence of the juror in the elevator was disputed as well as the content of the statements. The jury was asked if it was influenced or prejudiced by any alleged event alleged to have occurred at the indicated time. Counsel for petitioner indicated petitioner was present during the alleged occurrence, but the remarks were not made to petitioner directly. Despite an opportunity for further inquiry, petitioner's counsel declined and proceeded without further objection (p. 298).

3. Concerning the Admissions (Question 3.)

The Court of Appeals did not hold that statements made while in custody by one requesting an attorney are admissible. (See Petition, Appendix A). The interrogation lasted approximately 1½ hours (pp. 206, 207 and 214). Petitioner was offered coffee (p. 207); he was not "given coffee as a stimulant."

The interrogation was preceded by informing the petitioner of his right of silence and of counsel (p. 197). Immediately after the warnings petitioner insisted on continuing, as shown by the following which constitutes a knowing, intelligent and voluntary waiver:

> "Q. All right. And what followed that preliminary statement by you to Mr. Qualls?
>
> "A. He stated, well, I, he wanted to tell us what happened, wanted, he said 'I want to tell you what happened'." (p. 197)

Rule 785, Michigan General Court Rules of 1963, requires notice of admissions to defendant prior to trial. A pre-trial procedure for preventing improper admissions or statements was provided by such rule. Notice of Hear-

ing for such purpose is found at Vol. 1, Record on Appeal, 144. The Court of Appeals found an absence of objection to such admissions (Petition, Appendix A, p. 28). The only objection is shown at page 202 when petitioner refused to answer a particular question. On page 203, it appears this objection may have been withdrawn.

On cross-examination of the people's witnesses, petitioner carefully scrutinized the petitioner's statements during custodial interrogation (Petition, Appendix A, p. 28). One witness present at the interrogation was cross-examined concerning the petitioner's statements despite the fact that he did not testify concerning them on direct examination (pp. 215-223).

ARGUMENT

I.

USE OF DEFENDANT'S EVIDENCE PRESENTED AFTER DECISION ON A MOTION TO ACQUIT IS RESERVED, TO SUSTAIN HIS CONVICTION IN A STATE COURT, DOES NOT INFRINGE RIGHTS AGAINST SELF-INCRIMINATION.

Since the Michigan Court of Appeals did not squarely decide that there was no evidence by which a jury could find the element of provocation at the close of the people's case (it found provocation "not conclusively demonstrated"), it could be argued that there was sufficient evidence by which the jury could find guilt beyond a reasonable doubt without the testimony of the defendant-petitioner. Had the constitutional question been presented before the motion for rehearing, the determination of this point would undoubtedly have been more conclusive. This would furnish an independent ground to sustain the state decision.

In regard to the issue as stated, petitioner did not specifically object to the reservation of decision of the motion. He proceeded to present evidence without further comment. The self-incrimination allegation was apparently not argued to the trial court. The issue may not, therefore, have been properly preserved. In any case, however, respondent submits that no issue of self-incrimination is involved in reservation of decision on a motion to acquit and use of any evidence that defendant later presents to sustain the conviction.

There is a split of authority on whether decision on a

motion to acquit can be reserved. An example of a case approving the practice is *State* v. *Shiver,* 174 So 2d 778 (Fla. 1965). Among the cases disapproving the practice are *People* v. *Matu,* 5 Ill. App. 2d 577, 126 NE 2d 403 (1955); *Bennett v. People,* 155 Col. 101, 392 P 2d 657 (1964) and *Jackson v. United States,* 250 F 2d 897 (5th Cir. 1958).

There is a further split of authority on the question of whether the defendant's evidence presented after reservation may be considered. In the case of *denial* of a motion to acquit, the majority of decisions hold that any later testimony by the defendant may be considered and that objection to the denial is then waived by the defendant *(United States v. Calderon,* 348 US 160, 75 SC 186, 99 L. Ed 202 (1954); "Power and duty of court to direct or advise acquittal in criminal case for insufficiency of evidence," 17 ALR 910, 925; *Jackson v. United States,* 250 F 2d 897 (5th Cir. 1958).

In *United States v. Calderon,* 348 US 160, 75 SC 186, 99 L. Ed 202 (1954) where the defendant introduced evidence in his own behalf after denial of his motion to acquit at the close of the government's case, this court held that the reviewing courts could seek corroborative evidence in the proof of both parties. It held that by introducing evidence the defendant waived his objections to the denial of his motion to acquit (p. 164 n.1).

The waiver doctrine has been said by some courts to apply where evidence by the defense is presented after *reservation* of decision on a motion to acquit as well as after *denial* of such a motion. This dictum is found in *Moore v. United States,* 375 F 2d 877 (8th Cir - 1967) cert den. 389 US 844 and *United States v. Rosengarten,* 357 F 2d 263 (2nd Cir - 1966).

A minority of the cases refuse to find a waiver in defendants' introducing evidence after a motion to acquit at the end of the government's case is denied. This occurred in *Cephus v. United States,* 324 F 2d 893 (DC Cir 1963) where a co-defendant's testimony implicated appellant and he had to testify to contradict the testimony. The Court said that appellant did not voluntarily waive consideration of his motion in the light of the proofs at the time it was made but was forced to testify because of his co-defendants' testimony. In *State v. Fiorello,* 36 NJ 80, 174 A 2d 900 (1961), it was held that the validity of denial of a motion to acquit at the end of the state's case is tested in the light of evidence at that time without reference to corroborative evidence introduced during defendant's case. (The case concedes many cases hold to the contrary).

It should be noted that even in the cases refusing to recognize waiver and upon review, considering only the evidence when the motion is made, the decision is not based on the Fifth Amendment protection against self-incrimination. The reason is generally given that procedural rules in the jurisdiction require the result.

The Court should be informed, however, that some authorities have indicated a near involvement of self-incrimination principles. In *State* v. *Bacheller,* 89 NJL 433, 98 A 829 (1916) it was said that the waiver rule comes perilously close to compelling the accused to convict himself. (This argument is not repeated in the later New Jersey case of *State* v. *Fiorello,* 36 NJ 80, 174 A 2d 900 (1961), however, which also held that defendant's evidence should not be considered in testing the motion.) The *Bacheller* case was quoted in *Cephus* v. *United States,* 324 F 2d 893 (D.C. Cir. 1963), but the presence of co-defendants and no voluntary waiver distinguish that case. An article on the subject sees no distinction between denial and reser-

vation and argues against application of the waiver doctrine where the defendant presents evidence after the motion is made. The argument again is not based on the constitution's protection against self-incrimination (although the *Bacheller* case is cited) but on the advantages of requiring the prosecution to be responsible for the whole case ("The motion for acquittal: A Neglected Safeguard", 70 Yale Law Journal 1151.) No case, however, has been found which disapproves the waiver doctrine expressly because of violation of guarantees against self-incrimination.

It is, therefore, apparent that appellant's first reason for granting the writ is unsupported and is contrary to numerous decisions which either approve the waiver doctrine (the vast majority) or in disapproving it, adopt other reasons for doing so. It is clear that no right protected by the United States Constitution or laws is involved in appellant's first contention.

II.

THE DENIAL OF MISTRIAL FOR THE ALLEGED BERATING OF DEFENDANT'S COUNSEL BY AN OUTSIDER OUTSIDE THE COURTROOM DID NOT VIOLATE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY WHERE AN INVESTIGATION SHOWED THE JURORS' PRESENCE TO BE DISPUTED AND NO PREJUDICE OR INFLUENCE RESULTED, AND AN OPPORTUNITY FOR FURTHER QUESTIONING WAS REFUSED BY DEFENDANT.

The transcript (p. 291-298) clearly shows that the trial court conducted an investigation when it was alleged that improper remarks may have been made in the presence

of a juror. At the conclusion of the trial court's questioning defendant's counsel was offered the opportunity to put questions to the jurors, but did not do so. The indication by the Michigan Court of Appeals that this was a waiver of any irregularities is not unreasonable under such circumstances.

The principles articulated by the Michigan Court of Appeals on this issue (Petition, Appendix A, p. 27) are in accordance with the decisions of this court and other courts which have been faced with the issue. It states that upon learning of such an incident, the trial judge must ascertain its prejudicial effect. Whether a mistrial is required rests in the judges discretion. A mistrial should not be declared for a mere irregularity which is not prejudicial. If prejudice is shown by the judges' inquiry or the facts clearly establish the inference that it occurred, mistrial should be granted. It is difficult to see how petitioner could find error in such principles.

The investigation showed that the presence of the juror was disputed. The remarks were made by an outsider with no official connection with the proceedings. The remarks were apparently directed at counsel despite the fact that counsel stated that petitioner was present (p. 291). A joint polling of the jury after it was told the approximate time and nature of the incident, failed to indicate any influence or prejudice. Counsel for defendant refused to offer further questions. It is submitted that the trial court did not infringe sixth amendment rights in its exercise of discretion in refusing a mistrial.

This case is in no way similar to *Parker* v. *Glidden*, 385 US 363, 87 S. Ct. 468, 17 L. Ed 2d 420 (1966) relied on by petitioner. Here an outsider instead of a public officer made the alleged statements. The facts here do not involve

such a probability that prejudice resulted that denial of the mistrial led to a proceeding inherently lacking in due process. No juror testified he was influenced.

The joint questioning of the jury was not clearly erroneous. Such technique was found not to be an abuse of the trial court's wide discretion in *United States* v. *Miller*, 381 F 2d 529 (2nd Cir - 1967) where it was alleged that a juror had been threatened at a social gathering but joint questioning of three jurors produced negative answers on possible influence or prejudice.

It is therefore submitted that no sixth amendment rights of petitioner were infringed by the denial of mistrial. The exercise of discretion cannot be said to be clearly erroneous. Additionally, the principles used by the reviewing court are in accordance with prevailing law and thus examination of this issue by this Court would not appear to be necessary.

Respondent submits that this question does not warrant the grant of certiorari.

III.

AFTER AN INTELLIGENT, KNOWING, AND VOLUNTARY WAIVER OF THE RIGHT TO REMAIN SILENT AND OF THE PRESENCE OF COUNSEL, REFUSAL TO ANSWER A PARTICULAR QUESTION DOES NOT MAKE ADMISSIONS IN RESPONSE TO OTHER QUESTIONS INADMISSIBLE.

Before analysis of the main portion of this issue, the warnings must be briefly discussed since the testimony thereon does not show that petitioner was advised of his

right to appointed counsel if he was indigent. (See Petition, Appendix A, p. 28). Of course, petitioner did not raise an objection to any admissions *(Ibid)*. One cannot be sure therefore that closer questioning would not have revealed that such a warning was given.

Additionally, it has been held that where one has retained counsel at trial and on appeal, he clearly is not indigent and therefore need not have been warned of the right to appointed counsel. (*United States* v. *Fisher*, 387 F 2d 165 (2nd Cir - 1967); *United States* v. *Messina*, 388 F 2d 393 (2nd Cir 1968) citing *Miranda* v. *Arizonia*, 384 US 436, 473, n. 43, 86 S Ct 1602, 16 L. ed 2d 694 (1966).

Finally, petitioner does not raise this issue in his petition and thus this issue is waived and not before the Court (See generally 2 U.S. Supreme Court Digest Ann. "Appeal & Error," Sec. 1092). Thus proper warnings to petitioner should be assumed herein.

It is submitted that petitioner has also waived any right to complain of later events in the custodial interrogation. Although warned prior to trial under Michigan General Court Rule 785 of admissions (See Notice of Hearing for such purpose, Vol 1, Record on Appeal, 144) petitioner made no effort to exclude them in such a proceeding. In addition, defendant carefully cross-examined the state's witnesses about the admissions and with one witness elicited testimony on cross-examination about the admissions when the witness had not testified on direct examination concerning them. It is obvious that defendant was attempting to present his defense by cross-examination and thus avoid testifying. Under those circumstances, it is not surprising that the Court of Appeals found that petitioner was precluded from raising this question.

Petitioner's allegation that the record is barren of an intelligent, voluntary and knowing waiver is inaccurate. One is clearly shown at p. 197 of the transcript where petitioner insisted, after the warnings, that he tell the police "what happened."

Refusal to answer certain questions does not make the answer to others inadmissible. In *Santoro* v. *United States*, 388 F 2d 113, (9th Cir - 1967), the appellant stated he wanted his attorney present before answering along certain lines. He had been advised of his right to counsel, but proceeded to answer other questions. The questioning agent was careful to end any line of questioning with respect to which appellant indicated he wished to consult counsel. It was held that the appellant was not denied his right to counsel under such circumstances. While the decision is pre-*Miranda*, since the trial preceded that case, and while other aspects of the opinion are now questionable in the light of subsequent decisions of this Court, the ruling on this point seems relevant and properly applicable to the present case. Surely the refusal to answer one question without counsel did not cancel out the effect of petitioner's otherwise insistent disposition to tell the officers "what happened." It is, therefore, submitted that petitioner's right to counsel was not infringed in this case and the petition is without merit on this issue.

In the present case, *Miranda*, is apparently applicable since the trial took place in October of 1966 (Petition p. 17); *Johnson* v. *New Jersey*, 384 US 719, 16 L ed 2d 882, 86 S Ct 1772 (1966). The interrogation took place on April 3, 1965, however (Petition, p. 4). Thus the state did not have the benefit of the *Miranda* decision at the time of interrogation. This, of course, does not make *Miranda* inapplicable, but does show an additional reason

for the refusal of certiorari. *Miranda* is now available to guide the state in the area of law involved in petitioner's third issue.

CONCLUSION

The decision below is clearly correct. These is no conflict of decision on the three issues presented. No federally protected rights of petitioner have been infringed. It is submitted that the granting of certiorari is unnecessary.

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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